Supreme Court, U.S.
FILED

011024 JAN - 7 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PHOEBE THOMPSON, DEAN ECOFF and MARCIA E. WADE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT ANTONELLO
Florida Bar No. 025997
ROBERT G. FEGERS
Florida Bar No. 379719
Counsel of Record
ANTONELLO & FEGERS
Post Office Box 7692
Winter Haven, Florida 33883
(863) 294-2898

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

76pp

QUESTION PRESENTED FOR REVIEW

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165, comes within the scope of Congress' power to enforce the Fourteenth Amendment?

LIST OF PARTIES

The parties to the proceedings for which review is sought are those appearing on the caption of this case. It should be added that this case was brought as a class suit on behalf of all persons who obtained placards allowing use of accessible parking from the State of Colorado, but the issue of class certification was never reached by the district court.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved in this Case	1
Statement of the Case	1
Arguments for Granting Certiorari	3
I. Courts Are In Conflict	3
II. Issue Is Of Exceptional Importance	4
III. Supreme Court Has Previously Tried To Reach Question	5
Conclusion	6

TABLE OF AUTHORITIES

Page

Alsbrook v. City of Maumelle, Ark., 184 F.3d 999 (8th Cir. 1999) (6-4 en banc decision), *cert. dismissed*, 120 S.Ct. 1265 (2000) 4, 5

Amos v. Maryland Dep't of Public Safety, 178 F.3d 212 (4th Cir. 1999), *vacated for rehearing en banc*, (4th Cir. 1999), *dismissed*, 205 F.3d 687 (4th Cir. 2000) 3

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) 4, 5

Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001) 3

Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001) 2, 3

Duprey v. Connecticut, 28 F.Supp.2d 702 (D. Conn. 1998) 2

Garcia v. S.U.N.Y. Health Sciences Center, 2001 U.S. App. LEXIS 21366 (2d Cir. Sept. 25, 2001) 4

Kimel v. Florida Bd. of Regents, 139 F.2d 1426 (11th Cir. 1998), *cert. dismissed*, 528 U.S. 1184, 120 S.Ct. 1236, 145 L.Ed.2d 1131 (2000) 5

McGarry v. Missouri Dep't. of Rev., 7 F.Supp.2d 1022 (W.D. Mo. 1998), *vacated for lack of jurisdiction*, (W.D. Mo. Jan. 31, 2000), *appeal pending* 2

Reickenbacker v. Foster, 2001 U.S. App. LEXIS 25912 (5th Cir. Dec. 3, 2001) 4

Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001) ... 1, 2

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Colorado, 29 F.Supp.2d 1226 (D. Colo. 1998) 1, 2

Thrope v. Ohio, 19 F.Supp.2d 816 (S.D. Ohio 1998) 2

Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000) 4

Wroncy v. Oregon Dep't of Transp., 2001 U.S. Ct. App. LEXIS 8761 (9th Cir. May 4, 2001) (unpublished) 3

STATUTES:

42 U.S.C. § 12101 5

42 U.S.C. § 12132 ..... 1, 2

42 U.S.C. § 12202 1

Colo. Rev. Stat. § 42-3-121(2)(a) 2

OPINIONS BELOW

The opinion of the Court of Appeals is published at 258 F.3d 1241 (10th Cir. 2001). The opinion of the District Court is published at 29 F.Supp.2d 1226 (D. Colo. 1998). These opinions are each reproduced in the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was rendered on August 7, 2001. Rehearing and rehearing en banc were denied on October 9, 2001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The question presented involves the Fourteenth Amendment to the Constitution of the United States, the prohibition against disability discrimination in Title II of the Americans with Disabilities Act of 1990 ("Title II") at 42 U.S.C. § 12132; and Title II's abrogation of Eleventh Amendment immunity, at 42 U.S.C. § 12202. These are each reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners/Plaintiffs, Phoebe Thompson, Dean Ecoff, and Marcia E. Wade, on behalf of themselves and all others similarly situated ("Plaintiffs") filed suit in the United States District Court for the District of Colorado, challenging the policy of the State of Colorado ("State")

that a fee be paid for placards allowing use of accessible parking. See Colo. Rev. Stat. § 42-3-121(2)(a). Plaintiffs alleged that the placard fee is a facially discriminatory fee on access, in violation of 42 U.S.C. § 12132.[1]

The district court found that the placard fee violated Title II, and enjoined the State from requiring payment of a fee for a placard. *Thompson*, 29 F.Supp.2d at 1228. In so doing, the district court rejected the argument that the Eleventh Amendment immunizes the State from suit in federal court to enforce the ADA. *Thompson*, 29 F.Supp.2d at 1232-36.

The State appealed the order of dismissal to the United States Court of Appeals for the Tenth Circuit, which reversed the dismissal with a published opinion dated August 7, 2001. The Tenth Circuit found that Title II of the ADA is not within the Section 5 power, and so the Eleventh Amendment abrogation with respect to such claims is invalid. *Thompson*, 258 F.3d at 1246-55.

Plaintiffs timely petitioned for rehearing and rehearing en banc of the panel decision. Both were denied on October 9, 2001, but the panel did amend its opinion in certain relatively minor respects. This petition timely followed.

---

[1] See *Dare v. California*, 191 F.3d 1167, 1171-73 (9th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001); *Duprey v. Connecticut*, 28 F.Supp.2d 702 (D. Conn. 1998); *Thrope v. Ohio*, 19 F.Supp.2d 816 (S.D. Ohio 1998); *McGarry v. Missouri Dep't. of Rev.*, 7 F.Supp.2d 1022 (W.D. Mo. 1998), *vacated for lack of jurisdiction*, (W.D. Mo. Jan. 31, 2000), *appeal pending*.

ARGUMENTS FOR GRANTING CERTIORARI

The Tenth Circuit's decision – that Title II is not within Congress' authority under Section 5 of the Fourteenth Amendment – merits review because: (1) it is in conflict with decisions of other courts, including the United States Courts of Appeal for the Second, Fourth, and Ninth Circuits, that Title II is (either always or sometimes, depending on the Circuit) a legitimate exercise of Congressional power under Section 5; (2) it raises a question of exceptional importance; and (3) this Court has previously attempted to resolve this issue.

I. Courts Are In Conflict

The ability to enforce rights under Title II varies considerably depending on the area of the United States in which a person with disabilities lives. Such rights are enforceable without Eleventh Amendment interference in the Ninth Circuit. See *Wroncy v. Oregon Dep't of Transp.*, 2001 U.S. Ct. App. LEXIS 8761 (9th Cir. May 4, 2001) (unpublished); *Dare v. California*, 191 F.3d 1167, 1171-73 (9th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001). Some Title II rights, but only those which are judicially determined on a case-by-case basis to constitute appropriate responses to unconstitutional discrimination, may be enforced by federal courts in the Fourth Circuit. See *Amos v. Maryland Dep't of Public Safety*, 178 F.3d 212, 221 (4th Cir. 1999), *vacated for rehearing en banc*, (4th Cir. 1999), *dismissed*, 205 F.3d 687 (4th Cir. 2000); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001). The Second Circuit has determined that Title II may be enforced through a direct

action against a state defendant where the plaintiff alleges irrational discriminatory animus or ill will. *Garcia v. S.U.N.Y. Health Sciences Center*, 2001 U.S. App. LEXIS 21366 (2d Cir. Sept. 25, 2001). In the Fifth, Seventh, and Eighth Circuits, no action to enforce Title II may be brought against a state defendant in federal court. See *Reickenbacker v. Foster*, 2001 U.S. App. LEXIS 25912 (5th Cir. Dec. 3, 2001). *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000); *Alsbrook v. City of Maumelle, Ark.*, 184 F.3d 999 (8th Cir. 1999) (6-4 en banc decision), *cert. dismissed*, 120 S.Ct. 1265 (2000).

Given this balkanization with respect to the enforceability of rights under Title II, there is a need to unify this area of law. Otherwise, the enforceability of rights under Title II will continue to vary depending upon the federal circuit in which the party resides.

II. Issue Is Of Exceptional Importance

The importance of the enforceability of rights under Title II, and of the asserted immunities of the States from the enforcement of such rights, is a matter of unquestionable importance. This is reflected in part by the substantial attention given by the Court to disability rights issues in the last several terms. See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

Congress' findings also demonstrate the importance of the issue. Congress found that as of 1990, the number of Americans with one or more disability was 43,000,000,

and growing. Congress found that disability discrimination continues to be a serious and pervasive social problem, which persists in such areas as public accommodations, education, transportation, recreation, institutionalization, health services, voting, and access to public services. As a result, people with disabilities have been relegated to an inferior status, severely disadvantaged socially, vocationally, economically, and educationally. See 42 U.S.C. § 12101.

III. Supreme Court Has Previously Tried To Reach Question

This Court has previously determined that the question proposed here is worthy of certiorari review. Most recently, certiorari review was granted to resolve this issue in *Garrett*, but the Court ultimately determined that the issue was not properly presented in that case. *Garrett*, 121 S.Ct. at 960 n.1. Earlier efforts to resolve this issue on petitions granted in *Alsbrook* and *Kimel v. Florida Bd. of Regents*, 139 F.2d 1426 (11th Cir. 1998), *cert. dismissed*, 528 U.S. 1184, 120 S.Ct. 1236, 145 L.Ed.2d 1131 (2000), failed when those cases settled. The fact that this Court has granted certiorari to decide the constitutionality of Congress' abrogation of immunities for Title II claims on prior occasions, coupled with the continuing conflict among the Circuits since issuance of the decision in *Garrett*, demonstrates that the question presented by this petition is worthy of review.

CONCLUSION

Based on the foregoing, Plaintiffs ask that this Court grant this petition for writ of certiorari as to the question presented.

Respectfully submitted,

ANTONELLO & FEGERS
ROBERT ANTONELLO
Florida Bar No. 025997
ROBERT G. FEGERS
Florida Bar No. 379719
Post Office Box 7692
Winter Haven, FL 33883
(863) 294-2898

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHOEBE THOMPSON, DEAN ECOFF, and MARCIA E. WADE, on behalf of themselves and all others similarly situated,	No. 99-1045
Plaintiffs-Appellees,	
v.	
STATE OF COLORADO,	
Defendant-Appellant.	
UNITED STATES OF AMERICA,	
Intervenor.	

ORDER

Filed October 9, 2001

Before **BRISCOE**, Circuit Judge, **REAVLEY**, Senior Circuit Judge,* and **MURPHY**, Circuit Judge.

---

* The Honorable Thomas M. Reavley, Senior Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

The court has before it two petitions for rehearing with suggestions for rehearing *en banc* in *Thompson v. State of Colorado*, No. 99-1045, one by appellees and one by the United States as intervenor. The panel has unanimously voted to deny the petitions for rehearing. Nevertheless, on its own motion, the panel hereby amends the opinion filed on August 7, 2001 as follows: on page 28, "The absence of numerous examples" is changed to read, "The identification of only a few examples"; on page 29, "Without numerous documented occurrences" is changed to read, "Based on the 'minimal evidence of unconstitutional state discrimination' "; and on page 29, after "attempt to combat unconstitutional discrimination.", is inserted, "*Garrett*, 121 S. Ct. at 965-66."

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular service on the court requested that the court be polled, the en banc petitions are also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Jeanne Leal
Jeanne Leal
Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHOEBE THOMPSON, DEAN ECOFF, and MARCIA E. WADE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

STATE OF COLORADO,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Intervenor.

No. 99-1045

(Filed Aug. 7, 2001)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 96-S-1791)

Stephen R. Senn, Peterson & Myers, P.A., Lakeland, Florida; (J. Davis Connor, Peterson & Myers, P.A., Lakeland, Florida; Robert Antonello, Robert G. Fegers, Antonello, Fegers & CEA, Winter Haven, Florida; Glen F. Gordon, John A. Purvis, William R. Gray, Purvis, Gray & Gordon, LLP, Boulder, Colorado, with him on the briefs), for Plaintiffs-Appellees.

Paul Farley, Special Assistant Attorney General, State of Colorado, (Ken Salazar, Attorney General, State of Colorado, (Ken Salazar, Attorney General, State of Colorado, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Jessica Dunsay Silver, Seth M. Galanter, Attorneys, Civil Rights Division, Department of Justice, Washington, D.C., filed briefs on behalf of the Intervenor.

Before **BRISCOE**, Circuit Judge, **REAVLEY**, Senior Circuit Judge,* and **MURPHY**, Circuit Judge.

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiffs-Appellees brought a class action suit against Defendant-Appellant State of Colorado ("Colorado"). Plaintiffs claimed that the fee charged by Colorado for handicapped parking placards violated the Americans with Disabilities Act of 1990 ("ADA") and implementing regulations. After stipulating to various facts, both parties moved for summary judgment. In its motion for summary judgment, Colorado argued that Plaintiffs' claims were barred by the Eleventh Amendment. The district court granted Plaintiffs' motion for summary judgment and denied Colorado's motion for

---

* The Honorable Thomas M. Reavley, Senior Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

summary judgment. Colorado has appealed the district court's decision; jurisdiction to consider Colorado's appeal arises under 28 U.S.C. § 1291. Because Colorado is entitled to Eleventh Amendment immunity, this court **vacates** the order of the district court granting Plaintiffs' motion for summary judgment and denying Colorado's motion for summary judgment.

II. FACTS AND PROCEDURAL HISTORY

Under Colorado law, a "person with a disability" may apply for a special license plate or placard. *See* Colo. Rev. Stat. § 42-3-121(2)(a). The license plate and the placard allow the disabled person to park in designated handicap parking spaces. *See id.* § 42-4-1208(3)(a). The special license plates are supplied to the disabled at the same cost as standard license plates. *See id.* § 42-3-121(2)(a)(I). In order to receive a placard, however, a fee must be paid. *See id.* § 42-3-121(2)(d). The fee is not to exceed the actual cost of issuing the placard; at the time of appellate briefing the fee was $2.25. *See id.*

Plaintiffs brought a class action suit against Colorado challenging the imposition of the placard fee. Plaintiffs claimed that the placard fee violated Title II of the ADA and the implementing regulations promulgated by the Department of Justice. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The term "public entity" includes "any State or local government" and

"any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1). Plaintiffs also relied on 28 C.F.R. § 35.130(f), a regulation promulgated by the Department of Justice for the purpose of implementing Title II of the ADA. *See* 28 C.F.R. § 35.101. Section 35.130(f) provides as follows:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or this part.

Plaintiffs requested two forms of relief in their complaint: (1) a declaration that it is unlawful for Colorado to require payment for the parking placards and a subsequent injunction preventing Colorado from charging these fees in the future, and (2) reimbursement of previous fees paid by Plaintiffs for the placards after passage of the ADA.[1] Colorado was the only defendant named in the complaint.

In its answer, Colorado claimed, *inter alia,* that it was entitled to immunity under the Eleventh Amendment. After stipulating to many relevant facts, both parties moved for summary judgment. Although Plaintiffs' complaint sought both injunctive relief and reimbursement for past fees paid, Plaintiffs' motion for summary judgment was only for declaratory and injunctive relief.

---

[1] Plaintiffs also requested attorney fees and litigation costs.

The cross motions for summary judgment were referred to a magistrate judge. The magistrate judge concluded that (1) the placard fee charged by Colorado violated Title II of the ADA and its implementing regulations; (2) Colorado was not entitled to Eleventh Amendment immunity; and (3) Title II of the ADA does not violate the Tenth Amendment. The magistrate judge thus recommended that Plaintiffs' motion for summary judgment be granted, that Colorado's motion for summary judgment be denied, and that a schedule be set for certification of the plaintiff class claiming reimbursement of fees paid to Colorado for placards.

The district court adopted the magistrate judge's recommendations over Colorado's objections. Colorado appealed to this court. After oral argument, this court formally abated the case following the Supreme Court's grant of certiorari in *Florida Department of Corrections v. Dickson*. *See* 528 U.S. 1132 (2000). The *Dickson* case settled, however, and this case was then reactivated. *See Fla. Dep't of Corr. v. Dickson*, 528 U.S. 1184 (2000). This court further delayed deciding this case, however, in order to await the outcome of *Board of Trustees of the University of Alabama v. Garrett* and to allow the parties and the United States as intervenor to file supplemental briefs; the Supreme Court decided *Garrett* on February 21, 2001. *See* 121 S. Ct. 955 (2001).

III. DISCUSSION

On appeal, Colorado argues that it is entitled to Eleventh Amendment immunity from Plaintiffs' suit.

Under circuit precedent, a defendant's assertion of Eleventh Amendment immunity calls into question the subject matter jurisdiction of the district court. *See Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999), *overruled on other grounds by Garrett*, 121 S. Ct. at 967-68. *But see Idaho v. Coeur d'Alene*, 521 U.S. 261, 267 (1997) (stating that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"); *Cisneros v. Wilson*, 226 F.3d 1113, 1136, 1137 (10th Cir. 2000) (Kelly, J., concurring in part and dissenting in part) (arguing that "[w]ere the Eleventh Amendment truly jurisdictional, a court would not be free to ignore it" and stating that the court should not have reached the Eleventh Amendment issue), *majority holding overruled on other grounds by Garrett*, 121 S. Ct. at 967. Questions regarding jurisdiction must generally be answered before turning to the merits of a case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998) (rejecting the doctrine of hypothetical jurisdiction). The Supreme Court has held that the issue of whether a statute provides for suits against the states may be addressed before examining a defendant's claim of Eleventh Amendment immunity. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778-79 (2000). Colorado, however, concedes that Title II of the ADA contemplates suits by private individuals against the states. Thus, *Vermont Agency* is not applicable to this case and this court must resolve whether Colorado is entitled to Eleventh Amendment immunity before it can address whether Plaintiffs have stated a valid claim under Title II and its implementing regulations.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment has been understood as "evidencing and exemplifying" a concept of sovereign immunity implicit in the Constitution broader than the explicit language of the amendment might suggest. *Coeur d'Alene*, 521 U.S. at 267-68; *see also Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). Thus, although the explicit language of the Eleventh Amendment applies only to suits in federal court against a state by citizens of another state, immunity has been extended to suits in federal court by citizens against their own state, such as the present suit. *See Garrett*, 121 S. Ct. at 962; *Hans v. Louisiana*, 134 U.S. 1, 15-21 (1890); *cf. Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that states possess sovereign immunity from federal suits in state courts).

Certain exceptions to Eleventh Amendment immunity have been recognized. A state can waive its Eleventh Amendment immunity and consent to be sued. *See Coeur d'Alene*, 521 U.S. at 267. There has been no suggestion in this case, however, that Colorado consented to suit under Title II of the ADA. In addition, the Court has often found federal jurisdiction in suits against state officials seeking prospective injunctive relief. *See Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996). These suits are referred to as *Ex parte Young* suits, based on the Supreme Court case first recognizing this exception to Eleventh Amendment

immunity. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). Because no state official has been named as a defendant in this suit, however, the *Ex parte Young* exception to Eleventh Amendment immunity is not appropriate.[2]

---

[2] Plaintiffs have filed a Motion for Leave to Amend to Add Party Defendant, seeking to add Fred Fisher in his capacity as Executive Director of the Colorado Department of Revenue. This motion is obviously an attempt to make prospective injunctive relief possible through an *Ex parte Young* suit. It appears that, if this court were inclined to grant the motion, it would have the power to do so. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (concluding that appellate courts do have the power to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction); *Balgowan v. New Jersey*, 115 F.3d 214, 216-17 (3rd Cir. 1977) (granting motion to amend the complaint to add a state official as a defendant and to include a claim for prospective declaratory and injunctive relief, thus making *Ex parte Young* suit possible). Nevertheless, there are considerations weighing against Plaintiffs' motion.

Allowing Plaintiffs to amend their complaint would substantially alter the relevant legal issues to be decided in this case. Under the current complaint, the initial question that must be answered by this court is whether Colorado is entitled to Eleventh Amendment immunity. The main consideration in this analysis is whether Congress validly abrogated Colorado's Eleventh Amendment immunity in enacting Title II of the ADA. If Plaintiffs' motion to amend is granted, however, this court could address the district court's award of the prospective injunctive relief requested in Plaintiffs' motion for summary judgment without regard to the Eleventh Amendment immunity question. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). In addition, after Plaintiffs filed their motion to amend, Colorado asserted a challenge to Congress' ability to pass Title II of the ADA pursuant to the Interstate Commerce Clause. If Plaintiffs' motion to amend were granted, fairness would require this court to allow Defendants to press the Commerce

Under certain circumstances Congress may abrogate a state's Eleventh Amendment immunity. *See Seminole Tribe*, 517 U.S. at 55. First, Congress must "unequivocally express[ ] its intent to abrogate the immunity." *Green v.*

Clause argument; more briefing and perhaps additional oral argument would then be necessary to properly evaluate the Commerce Clause issue. Allowing the amendment would wholly alter the complexion of this case. Furthermore, unlike in *Balgowan*, there has been no reversal of a prior Supreme Court case on which Plaintiffs relied in drafting their complaint. In *Balgowan*, the plaintiffs had brought a claim against the New Jersey Department of Transportation seeking monetary relief for alleged violations of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201-219 (1978). *See* 115 F.3d at 216. Under Supreme Court precedent at the time the plaintiffs in *Balgowan* filed suit, it appeared that the FLSA was a valid exercise of Congress' Commerce Clause power and that Congress could abrogate Eleventh Amendment immunity through legislation enacted pursuant to the Commerce Clause. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985). In *Seminole Tribe v. Florida*, which was decided after the plaintiffs in *Balgowan* filed suit, the Supreme Court reversed *Union Gas* and held that Congress cannot abrogate Eleventh Amendment immunity by means of its Commerce Clause power. *See* 517 U.S. 44, 66 (1996). Thus, the Third Circuit allowed the plaintiffs to amend their complaint, partly because of the plaintiffs' reliance on *Union Gas*. *See Balgowan*, 115 F.3d at 217. Plaintiffs in this case, however, have identified no similar equitable consideration justifying their eleventh-hour request to amend their complaint. In *Newman-Green* the Supreme Court emphasized that the power of appellate courts to dismiss a nondiverse party "should be exercised sparingly." 490 U.S. at 837. This admonition applies to Plaintiffs' motion to add a party, which has neither alleged nor shown that denial of the motion results in an advantage lost by the Plaintiffs or disadvantage incurred. For the above-stated reasons, Plaintiffs' Motion for Leave to Amend to Add Party Defendant is **denied**.

Mansour, 474 U.S. 64, 68 (1985). Congress has clearly expressed its intent to abrogate Eleventh Amendment immunity in the ADA. *See* 42 U.S.C. § 12202. Second, Congress must abrogate Eleventh Amendment immunity pursuant to a "constitutional provision granting Congress the power to abrogate." *Seminole Tribe*, 517 U.S. at 59. After *Seminole Tribe*, only Section Five of the Fourteenth Amendment stands as a recognized source of power by which Congress can abrogate Eleventh Amendment immunity. *See id.* at 59-66 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress can abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause). Congress relied on Section Five of the Fourteenth Amendment in enacting the ADA. *See* 42 U.S.C. § 12101(b)(4). The mere recitation by Congress of Section Five as a basis for the ADA does not, however, end the inquiry; it is a function of the judicial branch to determine whether Congress was within its Section Five authority to abrogate the states' Eleventh Amendment immunity by enacting Title II. *See City of Boerne v. Flores*, 521 U.S. 507, 527-29 (1997); *Marbury v. Madison*, 1 Cranch 137, 176-80 (1803).

Both this court and the Supreme Court have recently considered whether the ADA is a valid abrogation of Eleventh Amendment immunity. In *Martin v. Kansas*, this court considered a former corrections officer's claims against the State of Kansas brought under Title I of the ADA. *See* 190 F.3d at 1123-25, 1129. Title I of the ADA prohibits certain employers, including the states, from "discriminat[ing] against a qualified individual with a disability" in matters related to employment. 42 U.S.C. § 12112(a); *see also* 42 U.S.C. § 12111(2), (5). In *Martin*, this

court concluded that "the ADA was a permissible exercise of Congress' Section 5 enforcement powers" and thus validly abrogated Kansas' Eleventh Amendment immunity. 190 F.3d at 1128. It is not entirely clear from the opinion, however, whether the holding that the ADA was a valid abrogation of the states' Eleventh Amendment immunity applied to all suits brought under the ADA or solely to Title I suits such as the one brought in *Martin*. *Compare Martin*, 190 F.3d at 1125-26 (describing ADA in terms of the duties imposed under Title I in matters of employment), *with Johnson v. Oklahoma*, Nos. 99-6322, 99-6427, 2000 WL 1114194, at *1 (10th Cir. Aug.7, 2000) (unpublished disposition) (suggesting *Martin*'s holding that the ADA validly abrogated the states' Eleventh Amendment immunity applied to a claim brought under Title II of the ADA).

This court again considered a claim brought under Title I of the ADA in *Cisneros v. Wilson*. *See* 226 F.3d at 1115. In *Cisneros*, the court considered whether *Martin*'s holding that the ADA abrogated Eleventh Amendment immunity was still good law in light of the Supreme Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). *See Cisneros*, 226 F.3d at 1118. In *Kimel*, the Supreme Court held that Congress did not validly abrogate the states' Eleventh Amendment immunity in passing the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. *See* 528 U.S. at 82-83. This court concluded in *Cisneros* that nothing in *Kimel* required the court to "revise the conclusions expressed" in *Martin* and thus confirmed the viability of *Martin*'s conclusion that the ADA validly abrogated the states' Eleventh Amendment immunity. 226 F.3d at 1128. Because both *Cisneros* and

Martin were Title I cases, however, it was not necessary for the *Cisneros* court to determine whether *Martin* applied to the entire ADA or just Title I.

In *Garrett*, the Supreme Court held that Title I of the ADA was not a valid abrogation of the states' Eleventh Amendment immunity. *See* 121 S. Ct. at 967-68. The Court noted that the legislative record of the ADA did not identify a pattern of unconstitutional discrimination by the states and that even if such a record existed "the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*." *Id.* at 966, 965. The Court, however, explicitly limited its ruling to Title I of the ADA and stated that it was "not disposed to decide [in *Garrett*] the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment." *Id.* at 960 n.1.

Against this backdrop of cases, this court must determine whether the validity of Congress' attempt through Title II to abrogate the states' Eleventh Amendment immunity is controlled by precedent. *Garrett*, although clearly instrumental in informing this court's analysis, expressly disavows any holding on Title II of the ADA. *See id.* As stated above, it is not clear whether the decision in *Martin* was intended to apply to the entire ADA or only Title I.[3] It is not necessary, however, for this court to resolve that because *Garrett* clarifies that when evaluating

---

[3] Whatever the scope of *Martin*, clearly *Garrett* now controls claims brought pursuant to Title I.

a claim under the ADA the abrogation analysis should be conducted on each specific title, not on the statute as a whole. The Supreme Court held in *Garrett* that Title I of the ADA was not a valid abrogation of Eleventh Amendment immunity; it did not render a decision as to the entire ADA. *See id.* Thus, even if *Martin* was a holding as to the entire ADA, *Garrett* demonstrates that it was error to conduct the abrogation analysis at that level of generality.[4] *See Currier v. Doran*, 242 F.3d 905, 912 (10th Cir.

---

[4] While some courts have addressed the Eleventh Amendment question by broadly considering the entire ADA, *see Coolbaugh v. Louisiana*, 136 F.3d 430, 437-38 (5th Cir. 1998), other courts have gone in the opposite direction and considered whether the specific regulation under which the plaintiff makes a claim is a valid abrogation of Eleventh Amendment immunity. *See Neinast v. Texas*, 217 F.3d 275, 280-82 (5th Cir. 2000) (stating that 28 C.F.R. § 35.130(f) exceeds Congress' Section Five power to enforce the Fourteenth Amendment), *cert denied*, 121 S. Ct. 1188 (2001); *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 701, 703-04 (4th Cir. 1999) (same), *cert. denied*, 121 S. Ct. 1186 (2001). This court agrees with the Ninth Circuit in rejecting a specific "piecemeal analysis" of whether each regulation passed pursuant to Title II is a valid abrogation of Eleventh Amendment immunity. *See Dare v. California*, 191 F.3d 1167, 1176 n. 7 (9th Cir. 1999), *cert denied*, 121 S. Ct. 1187 (2001); *see also Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc) (holding that Title II of the ADA is not a valid abrogation of Eleventh Amendment immunity). The analysis adopted by the Supreme Court in cases such as *Garrett* addresses *Congress'* ability to abrogate Eleventh Amendment immunity by enacting *legislation* pursuant to its power to enforce the Fourteenth Amendment. The power of various *agencies* to enact *regulations* implementing legislation passed by Congress is an entirely different question, one that is generally approached with deference by the courts. *See Olmstead v. Zimring*, 527 U.S. 581, 597 (1999) ("Because the Department [of Justice] is the agency

2001) (stating that a panel is not bound by a prior panel opinion when there is a superseding Supreme Court decision). Therefore, this court now writes on a clean slate in addressing whether Title II of the ADA is a valid abrogation of the states' Eleventh Amendment immunity.

Whether there has been an abrogation of Eleventh Amendment immunity is generally controlled by the "now familiar principles" for determining whether the statute in question was validly passed pursuant to Section Five of the Fourteenth Amendment. *Garrett,* 121 S. Ct. at 963. Section Five gives Congress the power to enforce the guarantees of the Fourteenth Amendment by enacting "appropriate legislation." U.S. Const. amend. XIV, § 5; *see also Flores,* 521 U.S. at 536. This power "includes the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 528 U.S. at 81. When Congress

---

directed by Congress to issue regulations implementing Title II, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; [i]t is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (quotations and citation omitted)). In this court's view, it is simply inappropriate to apply the abrogation analysis to agency regulations. Thus, as the Supreme Court did with Title I in *Garrett,* this court will conduct the abrogation analysis by considering Title II in its entirety.

has enacted legislation that exceeds the substantive guarantees of the Fourteenth Amendment, however, the legislation must exhibit "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520. In conducting the congruent and proportional analysis, courts look to the Congressional record to determine "whether Congress identified a history and pattern of unconstitutional [conduct] by the States." *Garrett*, 121 S. Ct. at 964.

In determining whether Title II is a valid abrogation of Eleventh Amendment immunity, it is first important to delineate with some care what conduct Title II prohibits or, perhaps more appropriately in this case, what conduct Title II requires. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

A cursory reading of the statutory language can leave the impression that Title II simply prohibits intentional exclusion against the disabled solely because of their status as "disabled." A more thorough review, however, reveals that, rather than preventing public entities from treating the disabled differently than the nondisabled, Title II requires that public entities make certain accommodations for the disabled in order to ensure their access to government programs. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 Ohio St. L.J. 335, 344 (2001) (stating that

"[s]imple equal treatment does not result in [the disabled's] inclusion into mainstream society" and that "[t]he ADA recognizes this need for different treatment"). That Title II of the ADA requires accommodations by public entities is evident from other portions of the statute, the regulations implementing Title II, and caselaw interpreting the statute.

The findings section of the ADA (applicable to all titles of the Act) states that

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, *the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,* exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(5) (emphasis added). The definition of a "qualified individual with a disability" also illustrates the affirmative duty Title II imposes on public entities:

> The term "qualified individual with a disability" means an individual with a disability who, *with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services,* meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2) (emphasis added). In addition, Part B of Title II delineates specific examples of what constitutes

"discrimination" by public entities in their public transportation services. *See id.* §§ 12141-12165. This section of the statute requires, *inter alia*, that all new public transportation vehicles be accessible to the disabled and that any public entity which operates a fixed route transportation system provide comparable services for use by the disabled. *See id.* §§ 12142-12144.

Thus, from the language of the statute it is clear Title II requires public entities to make accommodations for the disabled. The regulations issued by the Department of Justice implementing Title II confirm this reading of the statute. *Cf. Alexander v. Choate*, 469 U.S. 287, 304-05 & n.24 (1985) (using regulations as a source of guidance in interpreting a statute). One regulation provides that

> [a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7). The regulation on which Plaintiffs in this case have based their claim also demonstrates that public entities will be required to take certain "measures" in order to comply with Title II. *Id.* § 35.130(f).

Finally, many courts have recognized that Title II requires public entities to make accommodations for the disabled. *See, e.g., Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627, 638 (6th Cir. 2000) (stating that Title II "imposes an affirmative obligation on public entities to accommodate disabled individuals"), *rehearing en banc granted, opinion vacated* (Dec. 12, 2000); *Alsbrook v.*

City of Maumelle, 184 F.3d 999, 1009 (8th Cir. 1999) (en banc). Similarly, Section 504 of the Rehabilitation Act of 1973 ("§ 504"), which uses language almost identical to Title II in describing a violation by covered entities,[5] has been interpreted to require "reasonable accommodations" to covered programs or services. *See Sch. Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987) (stating that "reasonable accommodations" by covered entities are required under § 504); *Alexander*, 469 U.S. at 299-301 (assuming without deciding that § 504 provides for at least some disparate impact claims and that "reasonable accommodations . . . may have to be made"); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25 (1st Cir. 1991) (en banc). Thus, the duty to accommodate contained in Title II is well settled.

It appears, however, that the duty to accommodate under § 12132 is not boundless. Regulations issued by the Department of Justice speak of "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services" (emphasis added)). While expressly avoiding any ruling on the validity of § 35.130(b)(7), the Supreme Court has interpreted the regulation to allow inquiry into whether an accommodation is "reasonable" in light of, *inter alia*, "the resources available to the State." *Olmstead v. Zimring*, 527 U.S. 581, 607, 592, 603-07 (1999). It is not necessary for purposes of this case to determine exactly when a state

---

[5] *Compare* 42 U.S.C. § 12132, *with* 29 U.S.C. § 794(a).

might refuse an accommodation because it is "unreasonable" or because it "fundamentally alter[s] the nature of the service, program, or activity"; this court will assume that such a defense does exist in certain circumstances.

The next step in determining whether Title II is a valid abrogation of Eleventh Amendment immunity "is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 121 S. Ct. at 963. Section Five of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment. Plaintiffs claim that Title II enforces both the Equal Protection Clause and the Due Process Clause. *See* U.S. Const. amend. XIV, § 1.

The fundamental guarantee of the Equal Protection Clause is that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Thus, a typical claim brought under the Equal Protection Clause challenges a classification or distinction made by the state. The reviewing court then determines the seriousness with which the Equal Protection Clause treats the particular classification and then applies the appropriate degree of judicial scrutiny to the state justifications for making the distinction.

The Supreme Court case of *Cleburne* follows this pattern. In *Cleburne*, the Court considered an equal protection challenge to a city ordinance that required a special use permit for construction of a group home for the mentally disabled. *See id.* at 435-37. The Court determined that "mental retardation" is not a quasi-suspect class and

that state legislation making classifications based on mental retardation need only be rationally related to a legitimate city interest. *See id.* at 442-46. Thus, a state violates the Equal Protection Clause if it makes distinctions between the disabled and nondisabled without a rational justification.[6] Of course, "a bare [ ] desire to harm a politically unpopular group" is not a legitimate state interest. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). When a state acts with invidious intent there is an Equal Protection violation even if no facial distinction has been made and the state action merely has a disparate impact on the disabled. *See Lee v. City of L.A.*, 250 F.3d 668, 686-88 (9th Cir. 2001); *Erickson v. Bd. of Governors of State Colls. & Univs. for Northeastern Ill. Univ.*, 207 F.3d 945, 950 (7th Cir. 2000).

In contrast to the Equal Protection Clause prohibition on invidious discrimination against the disabled and irrational distinctions between the disabled and the nondisabled, Title II requires public entities to recognize the unique position of the disabled and to make favorable accommodations on their behalf. Thus, while the basic premise of the Equal Protection Clause is that similarly situated citizens should be treated alike, the mandate of the ADA is that those who are not similarly situated should be treated differently. The Equal Protection Clause does not generally require accommodations on behalf of

---

[6] Although *Cleburne* dealt only with classifications based on mental retardation, the Court's decision in *Garrett* confirms that classifications based on disabilities, whether mental or otherwise, are subject only to rational basis review. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963-65 (2001).

the disabled by the states. *See Garrett*, 121 S. Ct. at 964 ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."); *Erickson*, 207 F.3d at 951 ("[N]o one believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA.").

Plaintiffs correctly note that a fundamental interest in voting inheres in the Equal Protection Clause. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). Thus, state measures which have the effect of denying or diluting a citizen's vote must be justified with a compelling state interest. *See id.* at 670 (striking down state poll tax); *Reynolds v. Sims*, 377 U.S. 533, 568-69 (1964) (establishing the one person-one vote standard). It is not clear whether the equal protection interest in voting requires states to make accommodations for the disabled in order to ensure their ability to vote. *See Selph v. Council of L.A.*, 390 F.Supp. 58, 61 (C.D.Cal. 1975) (holding that Equal Protection Clause does not require city to make polling places accessible to the disabled when absentee voting is available); *Whalen v. Heimann*, 373 F.Supp. 353, 357 (D. Conn. 1974) (finding no equal protection violation in failing to provide absentee ballots to those who are physically unable to vote and stating that "[a] physically incapacitated voter has no more basis to challenge a voting requirement of personal appearance than a blind voter can complain that the ballot is not printed in braille" and that it is not "the province of courts to weigh the relative

ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters"); *cf. McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 806-11 & n.6 (1969) (holding that Illinois did not violate the Equal Protection Clause by refusing to give unsentenced inmates an absentee ballot, when there was no record evidence that inmates would be prevented from voting on election day). For purposes of this case only, this court assumes without deciding that the Equal Protection Clause requires states and local entities either to make polling locations accessible to the disabled or to allow the disabled to vote by absentee ballot.

Plaintiffs also rely on the Due Process Clause. The Due Process Clause of the Fourteenth Amendment has been interpreted to incorporate most of the guarantees found in the Bill of Rights; these incorporated provisions thus apply to the states as well as the federal government. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Some of the incorporated guarantees of the first ten amendments require states, on certain occasions, to make accommodations for the disabled. For instance, a prison is required to provide the disabled with accessible toilets in order to comply with the prohibition against cruel and unusual punishment contained in the Eighth Amendment. *See LaFaut v. Smith*, 834 F.2d 389, 389-95 (4th Cir. 1987) (Powell, J., sitting by designation). In at least some instances, the failure of states to provide accessible courtrooms could conceivably be a violation of due process. *See Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) ("[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of

the proceedings."); *Helminski v. Ayerst Labs.*, 766 F.2d 208, 215 (6th Cir. 1985) (holding that a civil litigant's "physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings"). These examples do not exhaust the categories of rights protected by a requirement for some level of accommodation under the Due Process Clause. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 309-10, 322 (1982) (holding that mentally disabled individual who had been involuntarily committed to a state institution was entitled by Due Process Clause to "minimally adequate training"). For purposes of this case, however, it is sufficient to note that the Due Process Clause does not contain the general mandate found in Title II, which requires accommodations by public entities in all of its "services, programs, or activities." 42 U.S.C. § 12132.

Thus, states can violate the Fourteenth Amendment rights of the disabled in three different ways. First, facial distinctions between the disabled and nondisabled are unconstitutional unless rationally related to a legitimate state interest. Second, invidious state action against the disabled is unconstitutional, even if facially neutral toward the disabled (such as neutral statutory language). Finally, in certain limited circumstances such as those involving voting rights and prison conditions, states are required to make at least some accommodations for the disabled.

Having explored the Fourteenth Amendment's protections of the disabled, this court next "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States against the disabled." *Garrett*, 121 S. Ct. at 964. In conducting this

inquiry, only constitutional violations committed by beneficiaries of the Eleventh Amendment are considered.[7] *See id.* at 965.

Congress held thirteen hearings and created a special task force to assess the need for the ADA. *See Garrett*, 121 S. Ct. at 969-70 (Breyer, J., dissenting). As a result of these inquiries, Congress determined that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Clearly, many of the "critical areas" in which Congress determined "discrimination" to exist apply to the states and come under the purview of Title II. Normally, congressional findings are entitled to much deference. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305,

---

[7] Of course, whether a particular defendant is entitled to Eleventh Amendment immunity is not always a straightforward question. *See, e.g., Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995-97 (10th Cir. 1993) (en banc) (applying four-part test to determine if local school districts are entitled to Eleventh Amendment immunity). As a result of the directive in *Garrett* that only congressional findings of constitutional violations by beneficiaries of the Eleventh Amendment be considered, a determination that a statute is not a valid abrogation of Eleventh Amendment immunity does not necessarily mean that the statute is not a valid exercise of Congress' power to enforce the Fourteenth Amendment. Because the Fourteenth Amendment applies to local government entities not entitled to Eleventh Amendment immunity, the analysis of whether Congress has the power to enact legislation requires inquiry into constitutional violations by these entities in addition to entities entitled to Eleventh Amendment immunity.

330 n.12 (1985). As explained above, however, Congress' determination of what constitutes "discrimination" against the disabled differs from discrimination in the constitutional sense. *See, e.g.*, 42 U.S.C. § 12101(5). This court's duty is therefore to determine "whether Congress identified a history and pattern of *unconstitutional* [ ] *discrimination* by the States against the disabled." *Garrett*, 121 S. Ct. at 964 (emphasis added).

There is some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government "services, programs, or activities." *See, e.g.*, 2 Staff of the House Comm. on Educ. & Labor, 101st Cong., 2d Sess., Legislative History of Public Law 101-336: The Americans with Disabilities Act 1230 (Comm. Print 1990) [hereinafter *Legislative History*] (discussing neighborhood opposition to housing for the mentally disabled); *see also Alexander*, 469 U.S. at 295 n.12 (discussing § 504 of the Rehabilitation Act of 1973 and stating that "well-cataloged instances of invidious discrimination against the handicapped do exist"). However, most of these occurrences involve local officials and not the states.[8] *See, e.g.*, 3 *Legislative History* 1872 (discussing invidious refusal by park commissioner to allow disabled person to swim in public pool). In any event, the vast majority of incidents discussed in the legislative record involving government "services, programs, or activities" are refusals by public entities to make accommodations

---

[8] In fact, by the time Congress enacted the ADA every state in the Union, including Colorado, had enacted legislation requiring some accommodations on behalf of the disabled. *See Garrett*, 121 S. Ct. at 964 n.5; Colo. Rev. Stat. § 9-5-101 to -112.

for the disabled. *See, e.g., Americans With Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the Comm. on Public Works and Transp.*, 101st Cong. 204-09 (1989) (statement of John Hudson, Social Work Coordinator at the National Rehabilitation Hospital in Washington, D.C.) (discussing lack of adequate public transportation for the disabled in Montgomery County, Maryland). The identification of only a few examples of unconstitutional discrimination against the disabled confirms the notion that Title II's primary focus was the failure by public entities to make accommodations for the disabled. *See Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (stating that "the ADA evolved from an attempt to remedy the effects of benign neglect resulting from the invisibility of the disabled" and that "invidious animus . . . was not the focus of . . . the ADA" (quotations omitted)); *see also Americans With Disabilities Act of 1989: Hearing on H.R. 2273 Before the Comm. on the Judiciary & the Subcomm. on Civil & Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 162 (1989) (statement of Laura D. Cooper, disabled attorney) ("It is my firm belief that many, but not all[,] of the inaccessibility problems that I have encountered are not so much the result of hostility or willful discrimination; rather, they are the result of benign neglect and a lack of understanding or concern about how particular policies or practices affect the disabled patrons in our midst."). The Supreme Court, in discussing § 504 of the Rehabilitation Act of 1973, upon which Title II of the ADA was based,[9] has stated that

---

[9] *See* H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303; H.R. Rep. No. 101-485(III), at 49-50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

> [d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.

Alexander, 469 U.S. at 295-96 (footnote omitted). This language is applicable to Title II of the ADA. Apathetic attitudes and refusals to make accommodations do not usually violate the Fourteenth Amendment.

This court cannot conclude that Congress "identified a history and pattern" of unconstitutional discrimination by the states against the disabled.[10] *Garrett,* 121 S. Ct. at 964. Nor can this court find in the caselaw "extensive litigation and discussion of the constitutional violations." *Id.* at 968 (Kennedy, J., concurring). Without this foundation, Title II cannot be considered preventive or remedial legislation that is congruent and proportional to any constitutional violation. Based on the "minimal evidence of unconstitutional state discrimination" against the disabled, Title II's accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination. *Garrett,* 121 S. Ct. at 965-66. In this respect, Title II resembles the Religious

---

[10] This court was also unable to identify a history and pattern of unconstitutional state conduct in The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities: From ADA to Empowerment (1990).

Freedom Restoration Act, which the Supreme Court struck down in *Flores*. *See* 521 U.S. at 536; *see also Erickson*, 207 F.3d at 951 ("What the RFRA did for religion, the ADA does for disabilities."). Thus, Title II is not a valid abrogation of the states' Eleventh Amendment immunity.[11]

IV. CONCLUSION

For the reasons stated above, Colorado is entitled to Eleventh Amendment immunity from Plaintiffs' suit and the district court erred in denying Colorado's motion for summary judgment. We therefore **VACATE** the order of the district court granting summary judgment for Plaintiffs and denying summary judgment for Colorado and **REMAND** with instructions that summary judgment be entered for Colorado.

---

[11] This court expresses no opinion on the constitutional power of Congress to enact Title II of the ADA. Thus, *Ex parte Young* suits seeking prospective injunctive relief and suits against entities not protected by the Eleventh Amendment are not prohibited by this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 96-S-1791

PHOEBE THOMPSON, DEAN ECOFF, and MARCIA E. WADE, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

STATE OF COLORADO,
Defendant.

ORDER

(Filed Dec. 22, 1998)

THIS MATTER comes before the court on the Recommendation of United States Magistrate Judge Coan that Plaintiffs' Motion for Summary Judgment be granted and Defendant's Motion for Summary Judgment be denied. Defendant has filed timely objections to the Recommendation. The court must make a *de novo* determination of those portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The court has conducted a *de novo* review of the motions (filed December 2, 1996), the Responses (filed December 30, 1996), the Supplements and Supplemental Responses (filed March 27, 1997, April 23, 1997, April 25, 1997, May 9, 1997, August 1, 1997, August 20, 1997, and August 29, 1997), the Recommendation (filed November 25, 1997), Defendant's Objections (filed December 9,

1997), Plaintiffs' Response (filed December 22, 1997), the Supplements and Supplemental Authority (filed April 10, 1998, April 13, 1998, June 15, 1998, July 23, 1998, September 8, 1998, and November 5, 1998), the entire case file, the exhibits, the extensive applicable law, and the excellent arguments presented at the hearing held December 18, 1998, and is sufficiently advised in the premises. The court hereby incorporates by reference the record of the hearing held December 18, 1998. After conducting such *de novo* review, the court agrees with the Magistrate Judge's Recommendation that Plaintiffs' motion must be granted and Defendant's motion must be denied. Accordingly, IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (filed December 2, 1996) is DENIED.

2. Plaintiffs' Motion for Summary Judgment (filed December 2, 1996) is GRANTED. Summary judgment shall hereby enter in favor of Plaintiffs and against Defendant on the First Claim for Relief. Defendant is hereby enjoined from implementing Colo.Rev.Stat. § 42-3-121(2)(d) (1998) to require payment of a fee for removable parking placards described in Colo.Rev.Stat. § 42-3-121(2)(a)(II) and issued pursuant to Colo.Rev.Stat. § 42-3-121(2)(b).

3. Because the Plaintiffs' Motion for Class Certification (filed September 18, 1998) is unopposed, the parties shall, as soon as practicable, submit a stipulated proposed order for class certification.

4. The parties shall, as soon as practicable, submit a stipulated schedule for the filing of briefs regarding the

Second Claim for Relief for reimbursement of past fees collected, prejudgment interest, attorneys' fees, and costs.

5. The court will set a further hearing on the remaining matters upon notice to the parties.

DATED at Denver, Colorado, this 21st day of December, 1996.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-S-1791

PHOEBE THOMPSON and DEAN ECOFF,
on behalf of themselves and
all others similarly situated,
Plaintiffs,

v.

STATE OF COLORADO,
Defendant.

RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

(Filed Nov. 25, 1997)

Patricia A. Coan, United States Magistrate Judge

This matter is before the court on cross motions for summary judgment. Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment were both filed December 2, 1996. On February 6, 1997 an Order of Reference under 28 U.S.C. §636(b) and Fed.R.Civ.P. 72 referred the motions to the undersigned United States Magistrate Judge for a recommendation. The motions have been fully briefed. The court has determined that oral argument would not assist the recommendation. For the reasons set forth below, the court recommends that Plaintiffs' Motion for Summary Judgment be granted and that Defendant's Motion for Summary Judgment be denied.

I. Background

Plaintiffs' complaint seeks relief on behalf of a putative class of individuals who qualify for disability parking placards purchased from the State of Colorado. Plaintiffs claim that the fee charged by the State for the parking placards under COLO.REV.STAT. §42-3-121, "Parking Privileges for Persons with Disabilities", violates Title II of the Americans with Disabilities Act of 1990 ("Act"). The parties have stipulated that the plaintiffs qualify for disabled parking privileges under COLO.REV.STAT. §42-3-121. *See* Stipulations filed November 22, 1996, ¶7. Defendant does not dispute that the plaintiffs are qualified individuals with disabilities under 42 U.S.C. §12131(2).

II. Standard of Review

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is proper under Fed.R.Civ.P. 56(c) when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The parties agree that there are no genuine issues of material fact in dispute for purposes of resolving the motions for summary judgment. Accordingly, the court will determine, as a matter of law, whether the fee

charged by the State of Colorado for disabled parking placards violates Title II of the ADA.

III. Legal Analysis

The Colorado General Assembly has adopted provisions which authorize certain parking privileges for persons with disabilities. COLO.REV.STAT. §42-3-121 (1996 Cum. Supp.). A disabled person may apply to the Department of Motor Vehicles ("DMV") for distinguishing license plates to be displayed on a motor vehicle owned by that person, and may also apply for a removable parking placard which can be placed in any motor vehicle used to transport the disabled person. §42-3-121(2)(a)(I) and (II). The statute directs the DMV to provide the distinguishing license plates at the same cost as standard plates. §42-3-121(2)(a)(I). The statute further authorizes the DMV to assess a fee for a removable parking placard to cover the State's cost in issuing the placard. §42-3-121(2)(d).

Defendant moves for summary judgment on the grounds that regulations promulgated by the Department of Transportation ("DOT"), rather than Title II of the ADA and its implementing regulations, govern parking for the disabled and that the nominal fee charged by the State for the parking placards is in accordance with DOT regulations. Defendant argues that under principles of statutory construction, the DOT regulations govern parking for the disabled as those regulations pertain specifically to handicap parking while Title II more generally prohibits disability discrimination by public entities. Defendant contends that because the DOT regulations do

not expressly require the State to assume the cost of the parking placards, the fees charged by the State under COLO.REV.STAT. §42-3-121, to compensate the State for the cost of each parking placard, are lawful.

Defendant alternatively argues that if the court finds that the fee charged by the State for parking placards violates Title II of the ADA, summary judgment for defendant is appropriate because Colorado is immune from suit under the Eleventh Amendment, and, because applying the mandates of Title II against the State is a violation of the Tenth Amendment.

Plaintiffs move for summary judgment on the ground that the parking placard fee charged by the State clearly violates the Department of Justice ("DOJ") regulations implementing Title II of the ADA which prohibit the State from charging disabled persons for the cost of ADA compliance measures. Plaintiff argues that Title II of the ADA is a comprehensive statute covering all areas of disability discrimination; thus, to the extent that the DOT regulations are not consistent with the mandates of Title II of the ADA and its implementing regulations, the ADA is the controlling law. Plaintiff further maintains that the States do not enjoy Eleventh or Tenth Amendment immunity from suit under Title II of the ADA as Congress has unequivocally and properly waived those immunities in the statute.

A. Does the Colorado Statute Violate Title II of the ADA

1. Does Title II of the ADA govern parking for the disabled?

The parties disagree about whether the DOT regulations setting forth a "Uniform System for Parking for Persons with Disabilities", 23 C.F.R. §1235 (March 11, 1991), or Title II and its implementing regulations published by the DOJ, 28 C.F.R. §35.130 (July 26, 1991), govern the issuance of parking placards for the disabled.

Title II of the ADA and its implementing regulations

The ADA became effective on January 26, 1992. Title II of the ADA, at 42 U.S.C. §12132, states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Congress directed the DOJ to promulgate regulations for the implementation of Title II which are contained in 28 C.F.R. §35.130. 42 U.S.C. §12134(a). The Title II implementing regulations state, in relevant part:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

> Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level as [sic] achievement as that provided to others;

28 C.F.R. §35.130(b)(1)(iii).

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. §35.130(f).

DOT regulations

On November 9, 1988, Congress enacted Public Law 100-641, 102 Stat. 3335, which states:

> Sec. 3. Handicapped Parking System
>
> (a) Regulations. – Not later than the 180th day following the date of the enactment of this Act, the Secretary of Transportation shall issue regulations –
>
> (1) which establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals, and
>
> (2) which encourage adoption of such system by all the States.
>
> In issuing such regulations, the Secretary shall consult the States.

Pursuant to Pub. Law 100-641, the DOT has published the following regulations, at 23 C.F.R. §1235.3 (March 11, 1991), to "provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk" (23 C.F.R. §1235.1):

> (a) Upon application of a person with a disability which limits or impairs the ability to walk, each State shall issue special license plates for the vehicle which is registered in the applicant's name. The initial application shall be accompanied by the certification of a licensed physician that the applicant meets the §1235.2(b) definition of persons with disabilities which limit or impair the ability to walk. The issuance of a special license plate shall not preclude the issuance of a removable windshield placard.
>
> . . .
>
> (c) The fee for the issuance of a special license plate shall not exceed the fee charged for a similar license plate for the same class vehicle.

Defendant argues that because neither Title II of the ADA nor the DOJ regulations specifically address parking regulations for the disabled, the DOT regulations regarding handicapped parking govern over the more general prohibitions against disability discrimination found in Title II and its implementing regulations. The court disagrees.

The court initially notes that the normal rules of statutory construction do not apply in this case because the two statutes do not contain conflicting mandatory

directives to the states. Title II of the ADA generally prohibits any form of discrimination against disabled persons by a public entity. Title II's implementing regulations reiterate Title II's prohibition against discrimination by a public entity and set forth numerous examples of prohibited conduct. *See* 28 C.F.R. §35.130. The ADA directs the Attorney General to publish regulations that implement Title II. 42 U.S.C. §12134. Because Congress expressly delegated authority to construe Title II by regulations, the regulations promulgated under Title II must be given controlling weight "unless they are arbitrary, capricious or contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984). Thus, Title II's prohibition is broad enough to encompass discrimination in parking or public building access.

In contrast, Pub.Law 100-641, enacted prior to the effective date of the ADA, does not *require* the states to comply with the uniform handicapped parking guidelines promulgated by the DOT, but rather "encourages" compliance with those guidelines. Nevertheless, neither Pub.Law 100-641, nor the DOT guidelines, expressly authorize the states to charge a fee for the issuance of removable parking placards. Instead, the statute and guidelines are silent on the subject.

Accordingly, the court finds that the fees charged by Colorado for removable windshield placards are within the scope of Title II of the ADA. The court's inquiry therefore moves to whether the fee charged to disabled persons for the parking placards is an unlawful "surcharge" to cover the cost of a measure that is necessary to provide the nondiscriminatory treatment required by Title II. 28 U.S.C. §35.130(f).

2. Does the parking placard fee violate Title II of the ADA?

Defendant argues that the fee charged by the Colorado DMV for removable parking placards, pursuant to COLO.REV.STAT. §42-3-121, does not violate Title II of the ADA because the parking placard is not a measure required to provide disabled persons with the non-discriminatory treatment prescribed by the ADA or its implementing regulations. Defendant emphasizes that the "service" provided by the State under §42-3-121 is disabled parking privileges. The State has not conditioned that service on the payment of a removable parking placard fee because the State has authorized the issuance of distinguishing license plates to disabled persons at the same cost as other plates are provided to non disabled persons. The removable parking placards are merely an alternative option to the distinguishing license plates and are therefore not *required* by the ADA: thus, the State is authorized to assess a small fee to compensate it for its costs in issuing the placards.

Plaintiffs respond that disabled persons realistically cannot enjoy the same parking privileges as non disabled persons unless they obtain a removable parking placard; thus, the removable placard is the only means by which disabled persons are afforded the equal access to public buildings enjoyed by non disabled persons. Plaintiffs emphasize that the distinguishing license plates are restrictive in that they must be used on a car owned by the disabled person; in contrast, the removable parking placard can be used in any car in which a disabled person is being transported. Because many disabled persons who

require special parking privileges are unable to drive, and are therefore unlikely to own a motor vehicle, the removable parking placard is the necessary means by which disabled persons are afforded the same access to public accommodations as is enjoyed by non disabled persons. The State cannot condition a disabled person's right to equal access upon payment of a fee.[1] *See* 28 C.F.R. §35.130(b)(1)(iii) and (f).

The Title II implementing regulations prohibit the State from placing a surcharge on disabled persons to cover the cost of measures that are necessary to provide disabled persons with the nondiscriminatory treatment mandated by the ADA. 28 C.F.R. §35.130(f).

The regulations promulgated under Title III of the ADA[2] require places of public accommodation to set aside parking places for persons with disabilities in order to provide disabled persons with easier access to the facilities. *See* 28 C.F.R. 36.304(a) and (b)(18); ADA Accessibility Guidelines for Buildings and Facilities, Appendix A to 28 C.F.R. Ch. I, Pt. 36, at §4.6.2. Thus, accessible parking for disabled persons is a compliance measure required by the ADA. The State of Colorado has determined that the purpose of providing special parking

---

[1] Plaintiffs do not challenge the State's imposition of a fee for the issuance of distinguishing license plates because that fee is assessed in the same manner as the State assesses license fees against non disabled vehicle owners.

[2] Title III of the ADA prohibits discrimination on the basis of a disability by owners, lessors or operators of private facilities which are frequented by the public. 42 U.S.C. §12182(a).

places for disabled persons would be defeated if non disabled persons were allowed to use those spaces. To ensure that only disabled persons use the parking spaces designated for them, the State has made it illegal for non disabled persons to park in handicapped parking spaces and has provided a means by which vehicles transporting disabled persons can be readily identified. COLO.REV.STAT. §42-4-1208(3) and (5). The required means of identification is the display of either distinguishing license plates or a removable windshield placard on the vehicle. Although disabled persons who own and drive vehicles may purchase the distinguishing license plates at the same cost as license plates issued to a non disabled person, those disabled persons who do not own a vehicle or who do not drive must pay a fee not required of non disabled persons in order to take advantage of handicapped parking spaces.

The Title II implementing regulations prohibit discrimination on the basis of a disability against disabled persons generally, *as well as groups of disabled persons.* 28 C.F.R. §35.130(f). Defendant's argument that "[a]ny person with a disability may avoid paying the fee for a placard simply by applying for distinguishing license plates instead" (Brief in Support of Defendant's Motion for Summary Judgment, p. 12) ignores the crucial fact that distinguishing license plates are of no use to many disabled persons.

In order to take advantage of handicapped parking in the State of Colorado, groups of disabled persons who do not own a vehicle, or who are driven by others, or who rent cars, have no choice but to use the removable placard to identify the vehicles used when parking in designated

spaces. Thus, for certain groups of disabled persons, the use of the removable placard provides the only means of access to disabled parking spaces. Without the placard, these groups of disabled persons would be precluded from parking in spaces mandated for their use by the ADA. The State of Colorado has therefore conditioned the right of certain *groups of disabled persons* to handicapped parking upon the purchase of removable placards.

The court finds that the fee imposed by the State to cover the cost of the removable placard is an illegal "surcharge" as contemplated by 28 C.F.R. §35.130(f). The Title II implementing regulations prohibit the State from placing a surcharge on a disabled person or a group of disabled persons to cover the cost of access to disabled parking spaces because disabled parking spaces are a compliance measure which is required by the ADA. 28 C.F.R. §35.130(f). The State's imposition of a removable parking placard fee solely upon disabled persons or groups of disabled persons, as a condition to their use of handicapped parking spaces, is a violation of Title II of the ADA.

B. Are Plaintiffs' Title II Claims Barred by the Eleventh Amendment?

Defendant argues that to the extent the court finds that the fee charged by the State to cover the cost of issuing a removable parking placard violates Title II of the ADA, plaintiffs' ADA claim is barred in its entirety by the Eleventh Amendment. Defendant argues that plaintiffs' Title II claim is cognizable only if Congress enacted Title II pursuant to its enforcement powers under §5 of

the Fourteenth Amendment. However, the legislative history of the ADA shows that Title II was enacted pursuant to Congress' powers under the Commerce Clause, powers which do not include the enactment of federal statutes which attempt to regulate the states as regulators.

The Eleventh Amendment bars a person from bringing suit against a state in federal court absent the state's consent to suit or absent a valid abrogation of that immunity by Congress.[3] *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240-41 (1985). In *Seminole Tribe*, the Supreme Court adopted a two-part test to determine whether Congress has abrogated a state's Eleventh Amendment immunity: (1) has Congress "unequivocally expresse[d] its intent to abrogate the immunity" (internal citation omitted); and (2) has Congress acted "pursuant to a valid exercise of power" (internal citation omitted). 116 S.Ct. at 1123. Under the second prong of the inquiry, the *Seminole* court held that Congress may abrogate a state's Eleventh Amendment immunity only if it acts pursuant to its powers under §5 of the Fourteenth Amendment. *Id.* at 1125. The Supreme Court over-ruled its earlier plurality decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress may abrogate a state's sovereign immunity in federal legislation enacted pursuant to its powers under the Interstate Commerce Clause, Art. I, §8, cl. 3. *Seminole Tribe*, 116 S.Ct. at 1128.

---

[3] The immunity granted to the states by the Eleventh Amendment is a complete immunity from suit in federal court, regardless of the relief requested. *Seminole Tribe*, 116 S.Ct at 1124 (internal citations omitted).

Defendant concedes that Congress clearly expressed its intent to abrogate the states' sovereign immunity in enacting Title II of the ADA. *See* Defendant's December 30, 1996 Response brief, p.5; 42 U.S.C. §12202.[4] Defendant contends, however, that Title II was not enacted pursuant to a valid exercise of Congressional power under §5 of the Fourteenth Amendment. Defendant maintains that although Congress expressly stated in the ADA that the legislation was passed pursuant to its powers under §5 of the Fourteenth Amendment and under the Interstate Commerce Clause,[5] the legislative history of the ADA shows that the statute was enacted solely under the Interstate Commerce Clause; therefore, Congress has not abrogated the states' sovereign immunity and the State of Colorado is not subject to suit in federal court for a violation of Title II.

The court initially notes that Congressional statements as to the basis of federal legislation are not dispositive. The question of whether Congress has acted within, or exceeded, its authority under §5 of the Fourteenth Amendment in enacting Title II of the ADA must be determined by the judiciary. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1802). Thus, the court will review

---

[4] 42 U.S.C. §12202 states: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter . . . "

[5] 42 U.S.C. §12101(b)(4) states: "It is the purpose of this chapter . . . to invoke the sweep of Congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

the language of the ADA to determine if Congress' invocation of its §5 powers as the basis for its enactment of the Act was appropriate.[6]

The Fourteenth Amendment, at Section 1, prohibits a State from making or enforcing any law which denies any person within its jurisdiction the equal protection of the laws.[7] Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." It is for Congress in the first instance to determine what legislation is needed to enforce the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). However Congress' powers under §5 are not limitless, *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Section 5 grants Congress a "remedial" power to enforce the Equal Protection Clause, but does not grant Congress the power to create substantive rights against the States. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2164 (1997) ("Congress does not enforce a Constitutional right by changing what that right is."). The line between legislation which

---

[6] "As a general matter, it is for Congress to determine the method by which it will reach a decision." *City of Boerne*, 117 S.Ct. at 2170. If legislative intent is clearly expressed in the text of the statute, reference to legislative history is unnecessary. Here, Congress has expressly invoked its powers under §5 of the Fourteenth Amendment in the body of the ADA; thus, despite defendant's invitation to do so, the court will not concern itself with the legislative history of the statute.

[7] The other prohibitions set forth in Section 1 of the Fourteenth Amendment are not relevant to a determination of the issue before the court.

enforces a constitutional right and legislation which substantively defines a constitutional right is an important one. Under separation of powers principles, the judiciary, not Congress, defines the substantive rights guaranteed by the Constitution. *Marbury v. Madison,* 5 U.S. (1 Cranch) at 176-178.

The Supreme Court discussed the delineation between enforcement and substantive legislation in *City of Boerne,* a case which struck down the Religious Freedom Restoration Act of 1993 ("RFRA"), formerly 42 U.S.C. §2000bb, *et seq.,* as an unauthorized exercise of Congressional power under §5 of the Fourteenth Amendment. RFRA prohibited the "government" (including the states) from substantially burdening a person's exercise of religion even if the burden resulted from a rule of general applicability unless the government could demonstrate that the burden was to further a compelling governmental interest and was the least restrictive means of furthering that interest. The *City of Boerne* court found that RFRA was not remedial legislation, but rather created substantive rights for persons who felt "substantially burdened" by a state in their exercise of freedom of religion, rights which far exceeded those which the Supreme Court recognized under the Free Exercise Clause in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).[8] *Id.,* at 2171. The

---

[8] *Smith* involved a free exercise challenge to a state law of general applicability which criminalized peyote use. The Supreme Court upheld the state law as applied to deny employment benefits to Native American members who lost their jobs because of such use on the ground that neutral, generally applicable laws may be applied to religious practices

Supreme Court specifically noted that RFRA was so broad as to ensure its intrusion at every level of government to prohibit official action of all kinds, regardless of subject matter; that RFRA had no termination date or termination mechanism; and that RFRA required the states to demonstrate a compelling governmental interest for a law challenged as substantially burdensome, a test expressly rejected by the Supreme Court in *Smith*. *Id.* at 2170-71.

Defendant relies on *City of Boerne* in arguing that Title II is an invalid exercise of Congressional power under §5 because Congress has attempted to create substantive rights for disabled persons under the Equal Protection Clause which are greater than those enunciated by the Supreme Court in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Defendant maintains that while the Supreme Court in *City of Cleburne* found that laws which burdened mentally handicapped persons could be held unconstitutional only if the government failed to show a rational basis for the law, the ADA improperly attempts to elevate the standard of review to one of strict scrutiny.

The Supreme Court's decision in *City of Cleburne* specifically addressed the rights to be afforded the mentally handicapped under the Equal Protection Clause. After noting that the mentally handicapped constituted a class of persons entitled to equal protection under the laws, the Court held that a law which distinguishes

---

even when not supported by a compelling governmental interest.

between the mentally handicapped and others must bear a rational relationship to a legitimate governmental purpose in order to withstand a constitutional challenge. 473 U.S. at 446. The Supreme Court has not addressed the specific question of what level of judicial review should be afforded laws which distinguish between a class of disabled persons generally and others. However, the Tenth Circuit Court of Appeals has applied the holding in *City of Cleburne* to disabled persons generally. *See Spragens v. Shalala,* 36 F.3d 947 (1994) (addressing equal protection challenge to social security legislation which afforded blind persons a larger maximum monthly disability payment than was afforded to plaintiff, who suffered from congenital deformity of the joints).

Under *Spragens* and *City of Cleburne,* a state must have a legitimate governmental interest in enacting laws which distinguish between disabled persons and non disabled persons. Thus, to the extent that the ADA *requires* state legislation which distinguishes between disabled and non disabled persons to pass a more rigid level of review to survive a constitutional challenge, Congress' attempt to exercise its Section 5 powers is invalid under *City of Boerne.* Defendant's argument that Congress has attempted to heighten the standard of review to strict scrutiny is based on the "Findings" section of the ADA, 42 U.S.C. §12101(a), which states:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . .
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

Importantly, the language in 42 U.S.C. §12101(a) is restricted to the "Findings" section and is not found elsewhere in the ADA. Although the Congressional findings do comport with the criteria set forth by the Supreme Court in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) as the criteria which have been traditionally considered by the courts in determining whether a class is "suspect",[9] Title II does not mandate that state legislation which distinguishes between disabled persons and others must pass a heightened standard of review under an Equal Protection Clause challenge. Instead, the ADA recognizes, as did the Supreme

---

[9] *San Antonio Ind. School Dist.* defines "suspect" class as one which "has been subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process." 411 U.S. at 28; *see, also, United States v. Carolene Products*, 304 U.S. 144, 153, n.4 (1938) (stating that classes entitled to protection under Equal Protection Clause include "discrete and insular minorities.").

Court in *City of Cleburne,* that disabled persons are entitled to protection from discrimination on the basis of their disability. The "Findings" section of the ADA merely supports Congress' determination that disability discrimination is existing and widespread and therefore needs to be prevented and remedied. To that end, Title II prohibits the States from arbitrarily discriminating against disabled persons on the basis of their disability. Thus, in contrast to RFRA, Title II of the ADA does not grant disabled persons greater substantive rights under the Equal Protection Clause than those set forth in *City of Cleburne.*

Defendant argues that Title II improperly attempts to circumvent the level of protection afforded to disabled persons under the Equal Protection Clause, as set forth in *City of Cleburne,* by prohibiting *all* state action which discriminates on the basis of disability, regardless of the legitimate governmental interest that such laws may serve. Defendant's argument was expressly addressed and rejected by the Supreme Court in *Katzenbach v. Morgan,* 384 U.S. at 648-49:

> a construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the [Fourteenth] Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to judge unconstitutional, or of merely informing

> the judgment of the judiciary by particularizing the "majestic generalities" of §1 of the Amendment.

Thus, the question before the court is not whether the judiciary would find that the Equal Protection Clause itself nullifies COLO.REV.STAT. §42-3-121(2)(d), but is rather whether Congress may prohibit the enforcement of the state statute by legislating under §5 of the Fourteenth Amendment. *Katzenbach,* 384 U.S. at 649. The Supreme Court has established the following test for determining whether Congressional legislation is properly enacted under section 5 of the Fourteenth Amendment to enforce equal protection rights guaranteed by section 1 of that Amendment: (1) whether the legislation "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) whether the legislation "is 'plainly adopted to that end' "; and (3) whether the legislation "is not prohibited by but is consistent with 'the letter and spirit of the constitution.' " *Katzenbach,* 384 U.S. at 651, quoting *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). The Supreme Court further clarified the nature of Congress' enforcement powers under Section 5 in *City of Boerne,* 117 S.Ct. at 2164: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

The court finds that Title II of the ADA is properly regarded as an enactment to enforce the Equal Protection Clause. The Supreme Court in *City of Cleburne* determined that disabled persons are entitled to equal protection under the law and Congress has expressly stated that the purpose of the legislation is "to provide a clear and comprehensive national mandate for the elimination of

discrimination against individuals with disabilities . . . " 42 U.S.C. §12101(b)(1). The court further finds that Title II was plainly enacted to remedy and prohibit arbitrary discriminatory action by the states on the basis of disability. And, the court finds that Title II is consistent with the Constitution in that it does not purport to create a greater (or lesser) level of constitutional protection to disabled persons than that determined by the Supreme Court in *City of Cleburne*.

While the mandates of Title II impose requirements on the states that impact a wide range of official conduct, the purpose of Title II is narrowly tailored to remedying and preventing arbitrary discrimination against disabled persons by the states. Thus, the characteristics of RFRA which the Supreme Court found objectionable in *City of Boerne* are not present in Title II of the ADA.[10]

Accordingly, the court finds, in accordance with *Seminole Tribe*, that Title II of the ADA was enacted pursuant to Congress' Fourteenth Amendment, §5 enforcement powers; therefore, Congress has properly abrogated

---

[10] Although Title II, like RFRA, has no termination date or termination mechanism, the Supreme Court recognized in *City of Boerne* that the lack of a termination date was not necessarily an indication in all cases that Congress had exceeded its authority under §5 of the Fourteenth Amendment. *City of Boerne*, 117 S.Ct. at 2170-71. The Supreme Court noted that in cases such as the one before it, where Congress was attempting to heighten the standard of judicial review for state laws which substantially burdened a person's free exercise of religion, such limitations within the statute itself help to ensure that Congress' means are proportionate to ends legitimate under §5. *Id.*

the State's sovereign immunity from suit in federal court for alleged violations of Title II of the ADA.

C. Does Title II of the ADA Violate the Tenth Amendment?

Defendant argues that Title II of the ADA violates the Tenth Amendment because Title II requires the states to regulate on behalf of the federal government and to appropriate state funds toward that end. The court disagrees.

The United States Constitution established a system of "dual sovereignty" between the States and the federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under the Tenth Amendment, those powers not expressly reserved to the federal government, or prohibited to the states by the Constitution, are retained by the states.

Defendant relies on the Supreme Court's decisions in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 117 S.Ct. 2365 (1997) in support of its position that Title II is an unconstitutional infringement upon the State's sovereign authority. In *New York*, the Supreme Court struck down a federal regulatory program which compelled the states to dispose of radioactive waste generated within their borders as an unauthorized Congressional mandate to the states. In *Printz*, the Supreme Court declared unconstitutional provisions of the Brady Act (an amendment to the Gun Control Act of 1968, 18 U.S.C. §921) which required state law enforcement officers to participate in the administration of a federal regulatory scheme in connection with the distribution of firearms by private dealers.

The federal legislation at issue in those cases differs in two important respects from Title II of the ADA. First, the legislation challenged in *New York* and *Printz* was not enacted pursuant to Congress' enforcement powers under §5 of the Fourteenth Amendment. In *New York*, 501 U.S. at 159-160, 176-177, the issue was whether Congress had properly acted pursuant to its powers under the Commerce Clause, the Spending Clause (Article I, §8, cl. 1), or the Supremacy Clause (Article VI, cl. 2). The issue in *Printz*, 117 S.Ct. at 2379, was whether Congress properly acted to regulate the sale of handguns pursuant to its powers under the Commerce Clause.

In contrast, Title II was enacted pursuant to Congress' powers under §5 of the Fourteenth Amendment. It is well established that when Congress acts pursuant to §5 concerns about interference with a state's sovereign authority are greatly diminished because §1 of the Fourteenth Amendment is an express limitation on the states' authority. One of the first cases to recognize the limitation on state authority imposed by the Civil War amendments was *Ex parte Virginia*, 100 U.S. 339, 346 (1980), in which the Supreme Court stated:

> [t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.

See, also, City of Rome v. United States, 446 U.S. 156, 179 (1980) (recognizing that Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty"); *Hodel v. Virginia Surface Mining and Rec. Assoc., Inc.,* 452 U.S. 264, 287, n.28 (1981) (noting that principles of federalism do not restrict Congressional power to invade state autonomy when Congress legislates under §5 because the Fourteenth Amendment was adopted with the specific purpose of limiting state autonomy); *EEOC v. Wyoming,* 460 U.S. 226, 243, n.18 (1983) (reaffirming that when Congress properly exercises its powers under §5, Congress is not limited by same Tenth Amendment constraints as are present when Congress legislates under the Commerce Clause); *Garcia v. San Antonio Metro. Transit Authority,* 469 U.S. 528, 549 (1985) (stating that Fourteenth Amendment "limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs."); *Gregory,* 501 U.S. at 468 (noting that the Fourteenth Amendment by its terms "contemplates interference with state authority.").

When Congress properly exercises its authority pursuant to an "affirmative Constitutional grant of power" such legislation is "not inconsistent with the Tenth Amendment." *New York,* 505 U.S. at 173-74. Section 5 of the Fourteenth Amendment is an affirmative grant of constitutional power. *Katzenbach,* 384 U.S. at 650 ("Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

The second important difference between Title II of the ADA and the federal regulatory schemes at issue in *Printz* and *New York* is that Title II does not compel states to implement or administer a federal regulatory program to remedy or prevent discrimination on the basis of disability. Rather, Title II of the ADA prohibits the State itself from engaging in discrimination on the basis of disability.[11]

Defendant also argues, under *New York*, that Title II is not a law of general applicability because it is specifically directed to conduct by the government; however, Title II cannot be separated out from the other subchapters which together form the ADA. Titles I and III prohibit discrimination by private entities and individuals. Thus, the ADA as a whole prohibits discrimination on the basis of a disability by state and private persons alike.

Because Title II of the ADA was properly enacted pursuant to Congress' §5 enforcement powers, as set forth in detail in Section III.B., *supra*, and because the ADA does not attempt to regulate the State of Colorado as a regulator, the court finds that Title II of the ADA does not violate the Tenth Amendment.

---

[11] Because Title II does not attempt to regulate the states as regulators, the court need not address the question of whether Congress may so regulate the states when acting pursuant to its powers under §5 of the Fourteenth Amendment. In any event, the answer to that question appears to be "No." "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the State to require or prohibit those acts." *Printz*, 117 S.Ct. at 2379, quoting *New York*, 505 U.S. at 166.

IV. Recommendation

For the reasons set forth above, the court recommends that Plaintiffs' Motion for Summary Judgment be granted and that Defendant's Motion for Summary Judgment be **denied**.

The court recommends that the State of Colorado be enjoined from further implementation of COLO.REV.STAT. §42-3-121(2)(d) as currently written. As set forth above, the State of Colorado may only impose a fee to cover the cost of issuing removable parking placards if such fees are borne equally by disabled and non disabled persons.

The court further recommends that a deadline be set for motions to certify the plaintiff class. Following resolution of the class certification issue, the court recommends that a hearing be set to determine amount of damages owed to the plaintiffs and to determine plaintiffs' entitlement to attorney's fees under 42 U.S.C. §12133.

Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation as provided by rules of court. The district court judge shall make a de novo determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Dated this 25th day of November, 1997.

BY THE COURT:

/s/ Patricia A. Coan
Patricia A. Coan
United States Magistrate
Judge

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01-1024

In the Supreme Court of the United States

PHOEBE THOMPSON, ET AL., PETITIONERS

v.

STATE OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
RALPH F. BOYD, JR.
Assistant Attorney General
JESSICA DUNSAY SILVER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

ANR Pipeline Co. v. *Lafaver*, 150 F.3d 1178 (10th Cir. 1998), cert. denied, 525 U.S. 1122 (1999)	8
Arkansas v. *Farm Credit Servs.*, 520 U.S. 821 (1997)	8
Ashwander v. *Tennessee Valley Auth.*, 297 U.S. 288 (1936)	10
Board of Trustees of Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001)	5, 6, 10, 12
Brown v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001)	11
Burris v. *City of Little Rock*, 941 F.2d 717 (8th Cir. 1991)	8
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	19
Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001)	9, 10
Folio v. *City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998)	8
Garcia v. *S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001)	7
Hason v. *Medical Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002), petition for reh'g en banc filed (Feb. 25, 2002)	7
Hedgepeth v. *Tennessee*, 215 F.3d 608 (6th Cir. 2000)	8

Cases—Continued: Page

Hexom v. *Oregon Dep't of Transp.*, 177 F.3d 1134 (9th Cir. 1999) 8
Hoohuli v. *Ariyoshi*, 741 F 2d 1169 (9th Cir. 1984) 8
Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997) 11
Lussier v. *Florida*, 972 F. Supp. 1412 (M.D. Fla. 1997) 9
Marcus v. *Kansas Dep't of Rev.*, 170 F.3d 1305 (10th Cir. 1999) 8
Neinast v. *Texas*, 217 F.3d 275 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001) 8
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 2
Popovich v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) 7
Randolph v. *Rodgers*, 253 F.3d 342 (8th Cir. 2001) 7
Reickenbacker v. *Foster*, 274 F.3d 974 (5th Cir. 2001) 7
Rendon v. *Florida*, 903 F. Supp. 601 (S.D. Fla. 1996) 8-9
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 11
Thompson v. *County of Franklin*, 15 F.3d 245 (2d Cir. 1994) 8
Thrope v. *Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998) 8
Trailer Marine Transp. Corp. v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) 8
Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381 (1998) 11
Young, Ex parte, 209 U.S. 123 (1908) 6

Constitution, statutes and regulations:

U.S. Const.:
Amend. XI ..... *passim*
Amend. XIV (Due Process Clause) 7
§ 5 ..... 5, 7, 11, 12
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 2

Statutes and regulations—Continued: Page

42 U.S.C. 12101(b)(1) 2
42 U.S.C. 12101(b)(4) 2
42 U.S.C. 12102(2) 5
Tit. I, 42 U.S.C. 12111-12117 2
Tit. II, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999) 2
42 U.S.C. 12131(1)(A) 3
42 U.S.C. 12131(1)(B) 3
42 U.S.C. 12132 3
42 U.S.C. 12133 2
42 U.S.C. 12134(a) 3
42 U.S.C. 12134(c) 3
Tit. III, 42 U.S.C. 12181-12189 (1994 & Supp. V 1999) 2
Tit. IV, 42 U.S.C. 12202 2
Rehabilitation Act of 1973, § 504(a), 29 U.S.C. 794(a) 3
Tax Injunction Act, 28 U.S.C. 1341 7
2 U.S.C. 1331(b)(1) (1994 & Supp. V 1999) 3
28 U.S.C. 2403(a) 5, 10
Colo . Rev. Stat. (Supp. 1996):
§ 42-3-121(2)(a)(I) 4
§ 42-3-121(2)(a)(II) 4
§ 42-4-1208(3)(a) 4
§ 42-4-1208(5) 4
28 C.F.R.:
Pt. 35 3
Section 35.130(f) 4, 5, 9, 10
Section 35.150 4
Section 35.151(c) 3
Pt. 36, App. A:
Section 4.1.2(5) 3
Section 4.6 4
Section 4.6.4 4

Regulations—Continued: Page

41 C.F.R. Pt. 101-19.6, App. A 3
Section 4.1.1(5) 4
Section 4.6 4

In the Supreme Court of the United States

No. 01-1024

PHOEBE THOMPSON, ET AL., PETITIONERS

v.

STATE OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-30), as amended on rehearing (Pet. App. 1-2), is reported at 278 F.3d 1020. The order of the district court (Pet. App. 31-33), and the accompanying report and recommendation of the magistrate judge (Pet. App. 34-61), are reported at 29 F. Supp. 2d 1226.

JURISDICTION

The court of appeals entered its judgment on August 7, 2001. A petition for rehearing was denied on October 9, 2001. Pet. App. 1-2. The petition for a writ of certiorari was filed on January 7, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. V 1999), addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability,

be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).[1]

Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. Those regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[2] Each space must be

---

[1] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which has governed "any program or activity conducted by any Executive agency" since 1978. In addition, Congress has extended the obligations of the Disabilities Act to itself. See 2 U.S.C. 1331(b)(1) (1994 & Supp. V 1999).

[2] 28 C.F.R. 35.151(c) permits public entities subject to Title II to select between these standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19.6, App. A. With respect to

"designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary in order to assure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." 28 C.F.R. 35.130(f).

2. Respondent State of Colorado permits cars to park in parking spaces "reserved for use by persons with disabilities" only if the car has a special license plate or removable windshield placard that indicates that the car is being used to transport a person with a mobility impairment. Pet. App. 5; Colo. Rev. Stat. § 42-4-1208(3)(a) (Supp. 1996). It is otherwise a crime to park in the spots designated for handicapped persons. See *id.* § 42-4-1208(5). Colorado charges no extra fee for the issuance of handicapped license plates, but, for persons with permanent disabilities, charges a fee for a handicapped parking placard. Pet. App. 5; Colo. Rev. Stat. § 42-3-121(2)(a)(II) (Supp. 1996). The amount of the fee may not exceed the actual cost of issuing the placard, *id.* § 42-3-121(2)(a)(I), which, at the time of briefing before the court of appeals, was $2.25 for a

---

parking requirements, the two sets of standards are virtually identical, see 41 C.F.R. Pt. 101-19.6, App. A, §§ 4.1.1(5), 4.6.

three-year authorization. Persons with temporary disabilities are not charged any fee for a placard, which is valid for 90 days. Appellant's C.A. App. 24.

Petitioners are persons with disabilities, within the meaning of the Disabilities Act (42 U.S.C. 12102(2)), who purchased placards so that they could park in accessible parking spaces. Pet. App. 5. They filed a lawsuit under Title II of the Disabilities Act against the State of Colorado, alleging that the fee violated 28 C.F.R. 35.130(f). Although the complaint sought both declaratory and injunctive relief and a refund of all previously paid fees, petitioners moved for summary judgment solely on their requests for declaratory and injunctive relief. Pet. App. 5-6. Colorado defended, in part, on the ground that the Eleventh Amendment barred the suit.

The magistrate judge, in an opinion adopted by the district court, held that Title II of the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. Pet. App. 31-33, 34-61. The court found that Title II of the Disabilities Act was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment because it was "enacted to remedy and prohibit arbitrary discriminatory action by the states on the basis of disability." *Id.* at 55. The court further found that the placard fee violated 28 C.F.R. 35.130(f) and enjoined respondent from requiring payment of a fee for receipt of a parking placard. Pet. App. 32, 38-45.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity. The court of appeals reversed. Pet. App. 1-30. The court acknowledged (*id.* at 14-16) that this Court, in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), specifically

reserved the question of whether the abrogation of Eleventh Amendment immunity for Title II was valid. Applying *Garrett*'s analytical framework, the court concluded that there was "some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" Pet. App. 27. The court further found that an even larger number of incidents involved "refusals by public entities to make accommodations," *ibid.*, which would be unconstitutional if invidiously motivated and which might be unconstitutional even in the absence of such illicit motives, *id.* at 22-25. The court nevertheless concluded that the evidence of discrimination was insufficient to justify the obligations imposed on States by Title II and, thus, that the abrogation of Eleventh Amendment immunity was invalid for Title II. The court stressed that "*Ex parte Young* [209 U.S. 123 (1908)] suits seeking prospective injunctive relief * * * are not prohibited by this opinion." *Id.* at 30 n.11. Petitioners could not avail themselves of that exception, however, because they had failed to name any state officials as defendants. *Id.* at 10-11 n.2.

ARGUMENT

Petitioners are correct (Pet. 4-5) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case.[3] This, however, is not that case. To

[3] Since this Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals addressing abrogation for

the contrary, there are significant jurisdictional and prudential barriers to granting plenary review here.

1. This case contains a potential bar to federal jurisdiction that is distinct from the Eleventh Amendment question presented and that could prevent resolution of that question in this case. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Colorado raised the Tax Injunction Act as an affirmative defense in the district court, Appellant's C.A. App. 17, and the issue of whether the fee assessment for parking placards constitutes a "tax" under state law was briefed by petitioners in their motion for summary judgment, *id.* at 85-91.

Although the issue was not passed upon by either court below, the Tax Injunction Act is a "broad juris-

---

Title II of the Disabilities Act have reached differing results. The Fifth and Eighth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Randolph* v. *Rodgers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd. of Cal.*, 279 F.3d 1167 (2002), petition for reh'g en banc filed (Feb. 25, 2002). The Second Circuit has held that the abrogation can be sustained for a subset of Title II cases. *Garcia* v. *S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2001) (construing Title II's remedial provisions to authorize damage awards against States only if the action was taken with "discriminatory animus or ill will towards the disabled"). The Sixth Circuit, in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (2002) (en banc), upheld the abrogation as appropriate legislation to enforce the Due Process Clause, at least as applied to require accommodations for a hearing-impaired father to enable him to participate in child custody proceedings.

dictional barrier" that imposes "fundamental[ly] importan[t]" restrictions on federal courts. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 825-826 (1997). Unlike the Eleventh Amendment, the Tax Injunction Act is a non-waivable limitation on the courts' subject-matter jurisdiction and thus must be raised by courts *sua sponte*. See, *e.g.*, *Folio* v. *City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998); *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 n.3 (2d Cir. 1994); *Trailer Marine Transp. Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992); *Burris* v. *City of Little Rock*, 941 F.2d 717, 721 (8th Cir. 1991); *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1176 (9th Cir. 1984).[4]

Courts have reached differing results on the question of whether analogous charges for parking placards constitute a "tax," in light of varying state law provisions regarding the amount and disposition of the fee. Compare *Neinast* v. *Texas*, 217 F.3d 275 (5th Cir. 2000) (charge is not a tax), cert. denied, 531 U.S. 1190 (2001); *Hexom* v. *Oregon Dep't of Transp.*, 177 F.3d 1134 (9th Cir. 1999) (same); *Marcus* v. *Kansas Dep't of Rev.*, 170 F.3d 1305 (10th Cir. 1999) (same); *Thrope* v. *Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998) (same), with *Hedgepeth* v. *Tennessee*, 215 F.3d 608 (6th Cir. 2000) (charge is a tax);

---

[4] At the time the District Court ruled in this case (Pet. App. 31), the Tenth Circuit had held that Eleventh Amendment issues should be resolved before reaching the applicability of the Tax Injunction Act because "the statutory limitations of the Tax Injunction Act are not jurisdictional." *ANR Pipeline Co.* v. *Lafaver*, 150 F.3d 1178, 1186 n.8 (10th Cir. 1998), cert. denied, 525 U.S. 1122 (1999). The Tenth Circuit has since retreated from that position. See *Marcus* v. *Kansas Dep't of Rev.*, 170 F.3d 1305, 1309 n.2 (10th Cir. 1999) (noting that, notwithstanding *ANR Pipeline*, "[i]n accordance with * * * Supreme Court precedents, we treat the Tax Injunction Act as a bar to federal jurisdiction").

Lussier v. *Florida*, 972 F. Supp. 1412 (M.D. Fla. 1997) (same); *Rendon* v. *Florida*, 930 F. Supp. 601 (S.D. Fla. 1996) (same). Because the character of the placard fee is largely a function of state law, the United States takes no position on the ultimate question of the Tax Injunction Act's applicability to this case. But the existence of such a non-constitutional, jurisdictional question, which would be heavily influenced by matters of state law undeveloped in the record below, stands as a significant potential obstacle to this Court's resolution of the Eleventh Amendment question presented.

2. A logical antecedent to adjudicating the question petitioners present for review is resolution of the non-constitutional issue of whether, as a matter of regulatory interpretation, the assessment of a fee for parking placards is prohibited by Title II. That inquiry turns upon whether parking placards for disabled persons are "required to provide that individual or group with the nondiscriminatory treatment required by the [Disabilities Act]," within the meaning of the relevant Justice Department regulation, 28 C.F.R. 35.130(f). That is an interpretive question about which there is substantial debate. Compare *Dare* v. *California*, 191 F.3d 1167, 1172-1173 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001), with *id.* at 1177-1181 (Fernandez, J., dissenting). While the Justice Department has not yet formulated a final position on the question, our initial review indicates that the parking placard fee does *not* violate the regulation. That is because such placards are not "required" to provide nondiscriminatory access to buildings or facilities. Colorado already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow the drivers to utilize the parking spots reserved for persons with disabilities. The placard fee here thus

can be understood as a fee for an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The license plate alone provides the access "required to provide * * * the nondiscriminatory treatment required by the Act." *Ibid.*

Although Colorado argued before the district court that the fee did not violate the regulation (see Pet. App. 42-45), the court of appeals did not address that interpretive issue in its decision.[5] But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it," *id.* at 346, further review should not be granted.

Furthermore, application of this Court's "now familiar principles," *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001), for evaluating the propriety of Section 5 legislation, requires evaluation of the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" by the legislation, *ibid.* (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). A case in which the application of Title II is so questionable provides a distinctly awkward vehicle in which fairly to assess congruence and proportionality, or otherwise to evaluate the practical scope and operation of Title II.

---

[5] The Department did not address the merits of the parties' positions either, having intervened to defend the constitutionality of the abrogation of Eleventh Amendment immunity. See 28 U.S.C. 2403.

Indeed, since *Garrett*, this Court has denied certiorari in two other cases presenting the same parking placard claims. See *Dare* v. *California*, *supra* (sustaining Title II's abrogation of Eleventh Amendment immunity); *Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (abrogation of Eleventh Amendment immunity invalidated), cert. denied, 531 U.S. 1190 (2001).

While the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998), that precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, which does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. * * * Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). In particular, where the Eleventh Amendment question is one of abrogation under Section 5, the justification for addressing jurisdictional questions first is further attenuated because, as noted, the inquiry into congruence and proportionality neces-

sarily requires a fair understanding of the statute's actual scope and operation, which in turn may necessitate at least a quick look at the merits. In fact, in this case, Colorado first urged the court of appeals to enter judgment for it on the merits (Resp. C.A. Br. 13-23), and then secondly briefed the argument (*id.* at 24) that, "[e]ven if the Court concludes that Title II" bars the fee, the Eleventh Amendment prevented the case from proceeding.

At a minimum, the prospect of courts routinely declaring unconstitutional laws duly enacted by the Congress and signed by the President based on their purely hypothesized application to challenged state action—especially when that application is subject to substantial debate—raises constitutional concerns that lie at the core of the *Ashwander* principle of constitutional avoidance, and that likewise should weigh heavily in this Court's exercise of its certiorari jurisdiction. Indeed, in *Garrett*, this Court dismissed as improvidently granted the question of whether the Title II abrogation was valid Section 5 legislation precisely because the parties had not briefed the question whether Title II was applicable to the claims at issue in that case. "We are not disposed to decide the constitutional issue whether Title II * * * is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1.

3. This case presents a peculiarly inappropriate vehicle for certiorari because it is in a profoundly interlocutory character, such that this Court's review may ultimately be unnecessary to afford petitioners the relief their summary judgment motion sought. Although petitioners' complaint sought monetary compensation, their summary judgment motion sought

exclusively declaratory and injunctive relief. Pet. App. 6. Thus, in the case's current procedural posture, the only issue presented to this Court for review is the denial of declaratory and injunctive relief on Eleventh Amendment grounds.

The court of appeals, however, specifically noted that "*Ex parte Young* suits seeking prospective injunctive relief * * * are not prohibited by this opinion." Pet. App. 30 n.11. Petitioners could not avail themselves of *Ex parte Young* on appeal because their complaint did not name any state officials as defendants. *Id.* at 10 & n.2. On remand, petitioners moved to amend their complaint to add an individual state official as a defendant (R. 97), to bring themselves within the court of appeals' exception for declaratory and injunctive relief sought on an *Ex parte Young* basis. While the district court denied that motion to amend (R. 100), the petitioners' appeal of that denial is currently pending before the court of appeals (No. 02-1036). Were the court of appeals to reverse the district court and permit amendment, this Court's resolution of the question presented would be entirely unnecessary to afford petitioners the relief their summary judgment motion sought. And even if the judgment is affirmed on appeal, the court of appeals' decision does not foreclose any litigant in the Tenth Circuit, with a properly styled complaint, from obtaining the very declaratory and injunctive relief petitioners seek. Thus, in its present procedural posture, this case asks the essentially hypothetical question of whether a party, who could obtain purely equitable relief available under *Ex parte Young*, also can obtain that same relief directly against a State without running afoul of the Eleventh Amendment. But resolution of that question is of no practical consequence to any litigant who complies with the pleading

requirements of *Ex parte Young*. In short, an exercise of this Court's certiorari jurisdiction is not warranted simply to relieve petitioners of the consequences of their pleading and summary judgment strategies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
RALPH F. BOYD, JR.
Assistant Attorney General
JESSICA DUNSAY SILVER
Attorney

APRIL 2002